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The rights and duties of railroad employers and employees arising out of the collective bargaining process are not restricted to those expressly and unambiguously stated in the most recently printed document purporting to be the agreement. The decisions below are in conflict with the growing body of federal substantive law applicable in suits to enforce rights arising out of the Railway Labor Act and collective bargaining conducted pursuant thereto 37

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The order denying petitioner's Rule 60(b) motion was an abuse of equitable discretion; it was an unjustifiable refusal to recognize the obvious, to wit, that the underlying rights and duties of the parties to a collective bargaining agreement in the railroad industry are to be found in the continuing collective bargaining and dispute-adjusting process structured by the Act as well as the printed agreement and, on the basis thereof, to set aside the prior judgment which rested squarely upon the contrary view that the sole source of such rights and duties was the fifteen year old agreement	56
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER,

Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY
COMPANY,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R 226) is reported at 336 F. 2d 543.

The District Court rendered three opinions. The opinion accompanying order denying respondent's first motion for summary judgment (R 22) is reported at 192 F. Supp. 882. The opinion accompany-

ing its findings of fact, conclusions of law and judgment granting respondent's second motion for summary judgment (R 56) is reported at 198 F. Supp. 402. The opinion accompanying order denying petitioner's motion for relief from final judgment (R 207) was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 4, 1964 (R 235). Petition for certiorari was filed December 2, 1964 and was granted March 1, 1965. The jurisdiction of this Court rests on 28 USC 1254 (1).

STATUTES INVOLVED

The statutes which the case involves are Sections 2 and 3 of the Railway Labor Act (c. 691, §§ 2-3, 48 Stat. 1186, 1189).

The statutes are printed in Appendix A hereto.

QUESTION PRESENTED

On October 8, 1958 the National Railroad Adjustment Board ordered respondent (hereinafter referred to as SD&AE) to reinstate petitioner to active service as a locomotive engineer and to pay him for time lost.

The order was based on an award which sustained petitioner's claim on the basis of an express finding by the Board that it had jurisdiction of the dispute

between petitioner and SD&AE, and of the parties, and an express finding that it had jurisdiction to determine, by reference to the findings of a neutral board of physicians, whether petitioner's removal from service constituted a proper assertion of the employer's right to determine, within proper limits, the physical fitness of its employees, or was a violation of petitioner's right to priority in service according to his seniority so long as physically qualified.

The question presented is whether the Railway Labor Act, which—

(1) confers jurisdiction on the Board to hear and determine disputes growing out of grievances or out of the interpretation or application of agreements, and

(2) confers jurisdiction upon federal district courts to entertain civil suits brought to enforce Board awards, and

(3) provides that, in such civil suit, the Board's findings are to constitute *prima facie* evidence of the facts therein stated—

together with other applicable federal substantive law, permitted the District Court, on SD&AE's motion for summary judgment, to make a finding as to the underlying rights and duties of the parties contrary to that of the Board and, on the basis thereof, to enter judgment setting aside the award thus precluding trial on the merits.

A subsidiary question is whether the District Court's adverse ruling on petitioner's motion to be

relieved from said judgment constituted an abuse of discretion in view of petitioner's clear showing, made in support of said motion, of evidentiary sources for said underlying rights and duties other than the document which, on the motion for summary judgment, the District Court treated as the sole such source.

STATEMENT

I.

STATEMENT OF THE PROCEEDINGS BELOW

Petitioner, F. J. Gunther, initiated this proceeding on September 26, 1960, by filing with the United States District Court for the Southern District of California, Southern Division, his petition for the relief provided by Section 3, First (p) of the Railway Labor Act (R 1-11). The order of the First Division of the National Railroad Adjustment Board (hereinafter referred to as "Board") which he sought to enforce¹ was the culmination of Board proceedings in which petitioner, acting through the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as "BLF&E")² had pressed his claim for

¹The Board's Findings, Award and Order of October 2, 1956 are Exhibit A to the petition (R 5-7). Its Interpretation, Award and Order of October 8, 1958 are Exhibit B to the petition (R 9-11).

²At all times pertinent herein petitioner was a member of BLF&E and General Chairman for its members employed by respondent SD&AE (R 52).

reinstatement to the work assignment from which, on December 30, 1954, respondent SD&AE had removed him on the ground of physical unfitness.

The District Court, after denying SD&AE's first motion for summary judgment without prejudice to renewal to re-assert the court's lack of jurisdiction to entertain the petition,³ responded to SD&AE's second motion by making a finding, on the basis of the pleadings and evidence submitted by affidavits, that the order sought to be enforced was *ultra vires* and, hence, should be set aside.⁴

Following entry of judgment dismissing his petition pursuant to said finding and the docketing of his appeal therefrom to the United States Court of Appeals for the Ninth Circuit, petitioner sought and obtained remand of the record and cause to the District Court to enable him to seek from that court an order relieving him from said judgment pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure (R 103-104). This motion was made, and opposed, on affidavits. The result was an order⁵ denying same from which petitioner perfected an additional appeal. The two appeals were then heard on a consolidated record by the Court of Appeals and both the judgment

³The District Court's minute order and memorandum opinion accompanying same are printed at R 22-31. The opinion is reported at 192 F. Supp. 882.

⁴The District Court's opinion, with notes and exhibits, is printed at R 56-93. It is reported in 198 F. Supp. 402. The Findings of Fact, Conclusions of Law and Judgment are printed at R 93-97.

⁵The District Court's opinion and order are printed at R 207-219.

of dismissal and the subsequent order denying relief under Rule 60 (b) were affirmed.⁶

Much of the evidentiary matter set forth in the following statement of the case was not before the District Court when it dismissed petitioner's suit by summary judgment. Particularly, the evidence of continuing negotiations resulting in modifications of the existing collective bargaining agreement, as evidenced by the green booklet⁷ which purported to be the SD&AE-Brotherhood of Locomotive Engineers (hereinafter referred to as "BLE") agreement executed on November 30, 1938, and which the District Court deemed to be the applicable agreement as of December 30, 1954, was first presented to the District Court on petitioner's rule 60 (b) motion (R 105-139).

Any question as to whether an evidentiary item, as stated below, was available to the District Court in the summary judgment proceeding can be resolved by noting the record page number to which reference is made. References to pages 1 to 97 of the printed record are to pre-summary judgment materials. Ref-

⁶The opinion and judgment of the Court of Appeals is printed at R 226-235. It is reported at 336 Fed. 2d 543.

⁷This is the booklet with green cover reading—"Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Engineers—Rules Effective March 1, 1935—Revised Rates of Pay Effective October 1, 1937"—which was Exhibit A to the affidavit of SD&AE's Manager of Personnel filed in support of SD&AE's first motion for summary judgment (R 14-15). It was, by reference, also Exhibit A to his affidavit filed in support of SD&AE's second motion for summary judgment (R 40).

The parties have stipulated that it need not be printed and is to be treated as a documentary exhibit. It is attached to the original record transmitted to this Court at page 19 thereof (R 15, 40).

erences to pages 98 to 237 of the printed record are to post-summary judgment materials.

II.

STATEMENT OF THE CASE

Petitioner was employed by SD&AE in 1916 and assigned to work as a locomotive fireman (R 32). He became a locomotive engineer in 1923 (R 32). On December 30, 1954, when SD&AE removed him from service because its examining physicians concluded that his heart was in such condition that he would be likely to suffer an acute coronary episode (R 15, 33, 40-41), he was the most senior of SD&AE locomotive engineers (R 54).

SD&AE is a wholly owned subsidiary of the Southern Pacific Company (hereinafter referred to as "SP") (R 172). It operates a freight service in California between El Centro and San Diego in conjunction with the Tijuana and Tecati Railroad Company which operates through a portion of Mexico (R 178, 205). The office of the Vice President and General Manager is in Los Angeles (R 172). Its directors and non-operating officers, including the Vice President and General Manager, also hold official positions with the Southern Pacific Company (R 172). For example, the same individual, Mr. K. K. Schomp, whose office is at the headquarters of SP at 65 Market Street, San Francisco, is Manager of Personnel for each company (R 157, 172).

For many years prior to December 30, 1954 SD&AE employees classified as locomotive engineers were represented, for purposes of collective bargaining with the employer, by the BLE (R 172). Throughout this period, however, petitioner was a member of a rival organization, the BLF&E, and for a considerable portion thereof immediately preceding December 30, 1954 he was General Chairman for that organization and, in that capacity, represented BLF&E members employed by SD&AE (R 52, 91, 139-140). During said period and until July 1, 1958, when it lost its certification to the BLE (R 173), BLF&E was the certified representative for collective bargaining purposes of SD&AE employees classified as firemen, hostlers and hostler helpers (R 173-174). In 1946 and 1950 BLF&E disputed BLE's right to represent locomotive engineer employees of SD&AE but on both occasions was unsuccessful in the election held by the Mediation Board and BLE continued as the certified representative of this class (R 172-173, 179-185).

From the time when BLE became the representative for locomotive engineers on the SD&AE until the present, the process of making and maintaining agreements concerning rates of pay, rules and working conditions, and that of settling grievances or "claims" arising out of the interpretation or application of such agreements, was carried on by correspondence and conference between SD&AE's Vice President and General Manager in Los Angeles, or its Manager of Personnel or one of his assistants, in San Francisco, and the BLE officials who were headquartered in San

San Francisco.⁸ These BLE officials also negotiated and conferred with various officials of the Southern Pacific Company, including its Manager of Personnel, who was also Manager of Personnel for SD&AE, in their representation of locomotive engineers employed by SP and working on its Pacific Lines, those working on SP lines which formerly were the El Paso and Southwestern Railroad, and those working at the Nogales Yard of the Southern Pacific Company of Mexico. These units, like the SD&AE, were separate units for the purpose of collective bargaining (R 174).

From time to time during this period changes in the agreements which resulted from this collective bargaining process were initiated by the notification procedure provided for by Section 6 of the Railway Labor Act (45 USC § 156).⁹ Such changes were evidenced by writings executed by authorized representatives of the company and of BLE.¹⁰ So far as the record shows, such writings remained in the files of SD&AE or the parent Southern Pacific Company and of the General Committee of Adjustment, Brotherhood of Locomotive Engineers, in San Francisco.

At rare intervals the "agreement" was published in booklet form. Two examples of such printed docu-

⁸See, generally, correspondence attached to affidavit of J. P. Colyar as exhibits A through O thereto, R 111-139; affidavit of C. M. Buckley, R 154-157; affidavit of K. K. Schomp, R 157-158; affidavit of C. A. Ball, Jr., R 159-160; affidavit of L. M. Fox, Jr., R 161-163; affidavit of K. K. Schomp, R 171-205.

⁹See exhibits D, E, F, and G to affidavit of K. K. Schomp, R 185-194.

¹⁰See, e.g., exhibits M, N and O to affidavit of J. P. Colyar, R 134-139.

ments are of record. They are the green booklet purporting to evidence the SD&AE-BLE agreement executed November 30, 1938¹¹ and a red booklet entitled—"Agreement by and between Southern Pacific Company (Pacific Lines) and its Locomotive Engineers Represented by the General Committee of Adjustment of the Brotherhood of Locomotive Engineers Effective August 1, 1958."¹²

(The District Court, in its opinion accompanying its order denying petitioner's Rule 60 (b) motion, refers to another such booklet—"the Orange Covered Booklet"—the cover of which bears the notation—"Agreement by and between the San Diego & Arizona Eastern Railway Company and its Locomotive Engineers Represented by the Brotherhood of Locomotive Engineers Effective January 1, 1956" (R 210). Although the District Court includes this booklet as being one of three collective bargaining agreements on file as exhibits in this case, it was not submitted in the proceeding to which this review extends. It was exhibit A to the affidavit of W. D. Lambrecht filed on or about February 13, 1958 in support of SD&AE's motion for summary judgment in *Gunther I*, Action No. 2080 SD W.¹³ It was referred to in the

¹¹Note 7, *supra*.

¹²This document was exhibit A to the affidavit of K. K. Schomp filed in opposition to petitioner's Rule 60 (b) motion. The parties have stipulated that it need not be printed and is to be treated as a documentary exhibit. It is attached to page 266 of the original record transmitted to this Court.

¹³*Gunther v. San Diego & Arizona Eastern Railway* (DC SD Calif., 1958) 161 F. Supp. 295.

affidavit of Charles W. Decker filed in support of petitioner's Rule 60 (b) motion (R 145).)

Since August 22, 1947 Mr. J. P. Colyar has been Chairman, General Committee of Adjustment, Brotherhood of Locomotive Engineers, for the Southern Pacific Company (Pacific Lines), the former El Paso & Southwestern System, the Northwestern Pacific Railroad Company, the San Diego & Arizona Eastern Railway Company, and the Southern Pacific Railway Company of Mexico (R 105-106). He stated, with respect to the printing of agreements—

“It is not customary in the railroad industry to print a new booklet each time the contracting parties agree to some modification to the existing agreement whether such modification is in the form of elimination of an existing provision, change in an existing provision, or addition of a new provision. Instead, such modifications are evidenced by exchanges of correspondence between the contracting parties and other such written memoranda.” (R 107)

An example of the procedure followed in order “to bring it (the printed document) up to date” (R 195) is exhibit H to the supplemental affidavit of K. K. Schomp (R 194-203).

A procedure other than that of serving notice of desired changes pursuant to Section 6 of the Railway Labor Act, or of bringing the printed agreement up to date, which led to modification of the existing agreement is evidenced by exhibits K and L to Mr. Colyar's affidavit (R 128-133). It appears therefrom, and is

conceded by SD&AE in the affidavits of C. M. Buckley (R 171) and K. K. Schomp (R 171), that the SP-BLE agreement was modified in 1947 as a result of conferences held in connection with the claim of Engineer C. O. Calloway "for compensation for time lost owing to his having been required by the Company to report to the General Hospital for physical examination." (R 155) According to Mr. Buckley—

"During said discussions the question of restricting of an engineer's seniority owing to his removal from his position account of his physical condition not meeting prescribed physical standards arose and was eventually disposed of by our agreement during conference with Brotherhood of Locomotive Engineers representatives, that in such cases in the future a three doctor panel would be provided in event an engineer desired the question of his physical ability to conform to prescribed physical standards to be determined." (R 156)

Mr. Colyar stated that this SP-BLE agreement for independent appraisal of physical fitness became a part of the SD&AE-BLE agreement on November 13, 1947 by reason of a prior SD&AE-BLE agreement to apply interpretations made on provisions of the SP-BLE agreement to similarly worded provisions of the SD&AE-BLE agreement, and that it remained a part thereof as of December 30, 1954 (R 109).

When petitioner reached his 70th birthday in 1953 SD&AE required him to take and pass a physical examination every three months (R 40). This "rule", although "not a part of the collective bargaining

agreement"¹⁴ (R 41) was complied with by petitioner. He reported for examination on November 24, 1953, and at each successive ninety day interval until December 15, ~~1953~~¹⁹⁵⁴ (R 14-15). Findings of SD&AE physicians made on that date were reviewed by its Chief Surgeon at the Southern Pacific Hospital in San Francisco "who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode" (R 15). Accordingly, on December 30, 1954, SD&AE removed petitioner from active service as a locomotive engineer (R 33).

The steps taken by petitioner in exhaustion of his administrative remedy were found by the Board to be as follows:

"Findings:

* * *

"Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

¹⁴The sole reference in the green booklet to physical examinations or standards of physical fitness is a provision at page 65 thereof conferring upon engineers disabled by loss of one eye the privilege of displacing any engineer his junior in branch service—a fact which influenced the District Court's characterization of the green booklet as a "bare-bone agreement." (R 65)

"Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

"Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician." (Findings, Award and Order, October 2, 1956, R 5-6)

The result of the Board proceeding in which the above findings were made was an award providing for a neutral panel of physicians to examine petitioner and report their findings, and an order to the parties to make the award effective (R 5-8). This award was based on the following findings of the Board as to the underlying rights and duties of the parties and its power to implement same.

"Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in

service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

"If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

"Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

"While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

"If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians." (Findings, Award and Order, October 2, 1956, R 6-7).

The events which followed are set forth in the Board's Interpretation (which included a finding that "the statements set out in claimant's submission are true" (R 10)), Award and Order of October 8, 1958.

"INTERPRETATION

"This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

"On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided

for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from carrying on his usual occupation, but that carrier advised claimant that 'the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty', and refused to reinstate claimant or pay him for time lost. Wherefore claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

"Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied." (Interpretation, Award and Order, October 8, 1958, R 9-11)

During the period October 2, 1956 to October 8, 1958 petitioner made his first attempt to secure the

relief afforded by Section 3, First (p) of the Railway Labor Act. His petition was dismissed as a result of SD&AE's motion for summary judgment and the District Court's view that the award of October 2, 1956 was of insufficient finality to support an enforcement suit (R 24-28).¹⁵

Following the "absolute and final" (R 10) award of October 8, 1958, petitioner, on March 21, 1960, authorized Mr. Colyar to prosecute his claim for enforcement of said award, as interpreted, with SD&AE (R 169). On April 6, 1960, SD&AE's manager of personnel, Mr. Schomp, responding to Mr. Colyar's letter of March 29, 1960 communicated SD&AE's refusal to comply with same (R 169-170).

In the petition by which, on September 26, 1960, this proceeding was initiated, petitioner simply alleged that, as of December 30, 1954, his "employment with defendant was governed by the terms of the Agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." (R 2) Further, he alleged that said agreement did "not require employees covered by same to retire from active service at any stated age limit" and that "by the terms of the agreement . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 2) With respect to the physical disqualification, he alleged that it constituted "in fact, imposition upon petitioner of compulsory retirement

¹⁵Note 13, *supra*.

in violation of petitioner's rights under the agreement" in that "at said time petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which would be required of its locomotive engineers." (R 2) He then set forth the facts relating to his resort to the Board and incorporated the results thereof, the award, as interpreted, by attaching copies thereof to his petition (R 5-11). He prayed for an order enforcing same (R 4).

SD&AE promptly moved for summary judgment, the third ground of same being that the order sought to be enforced was *ultra vires*, and therefore unenforceable, because, in requiring the establishment of a three physician panel to determine petitioner's right to continue in service, and in relying on the findings of said panel as the basis for sustaining petitioner's claim, the Board had exceeded its power to interpret and apply existing agreements and had, in effect, imposed upon SD&AE a duty for which it had never bargained (R 29).

This first motion was denied without prejudice to its renewal on said third ground (R 22) for reasons as stated in the opinion of the Court which accompanied the order of denial (R 30).

SD&AE then filed its answer and, simultaneously moved for summary judgment a second time, confining said motion to the third ground described above.

In its answer, SD&AE admitted that petitioner's employment with defendant "was subject to the terms of a collective bargaining agreement by and between

the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers, and that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service;" and admitted that it removed appellant from active service on December 30, 1954; but denied that he had rights to continue in active service or that appellant was, at that time, qualified physically to continue in active service (R 33).

The pertinent allegations of the affidavits filed in support of, and in opposition to, the second motion for summary judgment were the following:

1. In December, 1954, "... the applicable written agreement was a green-colored booklet dated March 1, 1935." (Supporting affidavit of K. K. Schomp, R 40)

2. "On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform services." (Supporting affidavit of K. K. Schomp, R 40)

3. There were "rules", some, but not all, of which were contained in the company's "Rules and Regulations of the Transportation Department"¹⁶ which

¹⁶The booklet "Rules and Regulations of the Transportation Department" is Exhibit B to Mr. Schomp's affidavit (R 43). The parties have stipulated that it need not be printed and may be treated as a documentary exhibit. It is found at page 72½ of the record transmitted to this Court.

"must be complied with by the employees and are not a part of the collective bargaining agreement." (Supporting affidavit of K. K. Schomp, R 41)

4. "Prior to and since December 30, 1954," the green colored booklet "has been the contract governing the employment of Mr. Gunther." (Supporting affidavit of K. K. Schomp, R 41)

5. The "contract (the green booklet) contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service" until December 1, 1959, when, as a result of a demand made upon respondent by Mr. J. P. Colyar, General Chairman of the BLE, such a provision became effective by means of an "amending agreement." (Supporting affidavit of K. K. Schomp, R 41-42)

6. Petitioner, as General Chairman of the BLF&E, nonetheless was "for many years actively engaged in enforcing the provisions of the Agreement referred to in his petition" and "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant." (Opposing affidavit of F. J. Gunther, R 52)

7. Said agreement adopts the principle of seniority and provides:

"Article 35—Seniority

"Section 1

"Rights of engineers shall be governed by seniority in service of the Company as engineers and

seniority of the engineer as herein defined shall date from first service as an engineer.

"Section 3 (b)

"Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Opposing affidavit of F. J. Gunther, R 52-53)

8. Said agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

"Section 1 (b)

"No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

"Section 1 (e)

"If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account." (Opposing affidavit of F. J. Gunther, R 53)

9. That, with respect to reduction in force, said agreement provided:

"Article 38—Reduction of force

"Section 1 (a)

"When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect,

displace any fireman their junior under the following conditions:

* * * * *

“Second: That when reductions are made they shall be in reverse order of seniority.” (Opposing affidavit of F. J. Gunther, R 53)

10. That the foregoing provisions were “vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same.” (Opposing affidavit of F. J. Gunther, R 53)

11. “That at all times pertinent herein the interpretation of said provisions, and their application to defendant’s operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the ‘... (R)ights of engineers ... governed by seniority in the service of the Company ...’ were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry.” (Opposing affidavit of F. J. Gunther, R 54)

12. “That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or other-

wise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant." (Opposing affidavit of F. J. Gunther, R 54)

13. "That at all said times it was never the custom and practice for the active employment of an engineer covered by said agreement to be terminated by retirement against the will of such engineer." (Opposing affidavit of F. J. Gunther, R 54)

The District Court found the "collective bargaining agreement between plaintiff and defendant's Union, *Brotherhood of Locomotive Engineers*"¹⁷ to be the green booklet. (Finding of Fact 4, R 94) It held that the provisions according seniority rights and protection against discharge except for good cause cannot, as a matter of law, be deemed to restrict the "residual right" of respondent carrier to remove its engineer employees from active service upon an ex-parte determination of physical unfitness. (R 71-72) It was the Court's view that, because the green booklet is silent thereon, the carrier retained—had not "surren-

¹⁷The District Court, obviously, intended this finding to read "between defendant and plaintiff's union." But the error of ascribing to Mr. Gunther membership in the BLE was not inadvertent. As late as the argument on the Rule 60(b) motion, the District Court was still referring to the BLE as "petitioner's union".

dered" said right (R 77). Despite the "bare bone" aspect of the green booklet the Court had "no difficulty" in interpreting its provisions as to seniority (R 67, 71). The Court was not impressed with petitioner's contention that, since the terms of the agreement relating to the rights of engineers to remain in active service, whether by reason of seniority rights, right to continue in service in absence of good cause for discharge, or otherwise, were far from clear, and since the circumstances, scope and bounds thereof were to be found "by reference to a long history of custom and practice in the railroad industry," petitioner should not be precluded from his opportunity to present evidence, extrinsic to the green booklet, at a trial upon the merits (R 71).

Finding, then, no limitation in the green booklet upon the carrier's residual right to disqualify its locomotive engineers from active service upon an ex-parte determination of physical unfitness, the Court held that the action of the Board in requiring the establishment of a three physician panel to be in excess of its jurisdiction to "interpret and apply" existing agreements.¹⁸ Having thus concluded the award and order sought to be enforced was, in its view, a nullity, the Court granted summary judgment because "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (R 79)

¹⁸"The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award." (Opinion of Sept. 26, 1961, R 78)

Following the docketing of the appeal from the summary judgment, on or about Feb. 28, 1962, petitioner's attorney attended a conference at the office of J. P. Colyar, Chairman of the General Committee of Adjustment, BLE. At said conference said attorney learned, for the first time,¹⁹ the following:

1. That effective January 1, 1945, as a result of an exchange of correspondence²⁰ between SD&AE and the BLE, acting for the engineer employees of SD&AE, the carrier agreed to apply "interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement."²¹

2. Also, as a result of said exchange of correspondence, a new provision, Article 9, Section 1 (c), identical to Article 12, Section 1 (c) of the Pacific Lines-BLE Agreement, was added to the SD&AE-BLE Agreement. Thus, as of January 1, 1945 the Pacific Lines-BLE Agreement and the SD&AE-BLE Agreement contained the identical provision:

"Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."²²

¹⁹The affidavit of Charles W. Decker, filed in support of petitioner's Rule 60 (b) motion, explains in some detail how he continued under the misapprehension that the green booklet was the entire written agreement until his conference with Mr. Colyar (R 142-153).

²⁰Exhibits A through J to Mr. Colyar's affidavit filed in support of petitioner's Rule 60 (b) motion (R 111-127).

²¹Exhibit H, Colyar affidavit (R 125).

²²Colyar affidavit (R 108).

3. Effective October 2 or November 13, 1947, as a result of the adjustment of a grievance arising out of the claim of one C. O. Callaway, and memorialized in letters over the signatures of the Assistant General Manager and the Assistant Manager of Personnel of the Southern Pacific Company addressed to BLE officials, agreement was reached with respect to application of Article 12, Section 1(c) of the Pacific Lines-BLE Agreement as follows:

"We further advised you, with the understanding that it is the Company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses,

if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer."²³

According to the affidavit of Mr. Colyar, this constituted an "interpretation" upon said Article 12, Section 1(c) (R 109).

4. That it was Mr. Colyar's opinion that, because of the foregoing, as of no later than November 13, 1947 and to and including December 30, 1954, the Agreement between the SD&AE and its engineers as represented by the BLE contained a provision specifically providing for resort to a three physician panel to determine an engineer employee's physical fitness to continue in active service (R 109-110), and

5. That the subsequent demand²⁴ by Mr. Colyar under date of August 28, 1959 for a new Section 3(a) of Article 68 of the SD&AE-BLE Agreement relating to a three physician panel for determining the physical fitness of engineer employees to continue in active service was not for the purpose of creating a new contractual right but "to clarify and make more explicit the existing provision" for such right.²⁵

Upon learning the foregoing, petitioner secured an order from the District Court indicating its intention to entertain his motion to be relieved from the operation of the summary judgment (R 206-207) and thereby secured an order of the Court of Appeals re-

²³Exhibits K and L, Colyar affidavit (R 128-133).

²⁴Exhibit M, Colyar affidavit (R 134); Exhibit B, Schomp affidavit (R 20); Exhibit C, Schomp affidavit (R 43).

²⁵Colyar affidavit (R 110).

manding the record. Petitioner's Rule 60(b) motion for relief from the operation of the summary judgment was heard on affidavits which included averments as to the facts set forth above and, additionally, averments of petitioner explaining the circumstances which prevented him from knowing about the provisions for the three-physician panel as created by the correspondence between the carrier and officials of the BLE. In his affidavit petitioner emphasized that at no time was he a member of the BLE; that he did not have access to the correspondence which resulted in the establishment of the three-physician panel provision; that his knowledge of the SD&AE-BLE Agreement was limited to the contents of the green booklet; and that he did not know of the correspondence establishing the three doctor panel method of resolving dispute as to physical fitness until he read Mr. Colyar's affidavit.²⁶

On April 10, 1963, the District Court made its order denying said motion (R 218-219). In its opinion which accompanied said order the Court expressed the view that petitioner's failure to discover the correspondence in question was not justified; that "recourse to statements in affidavits filed by defendant is not necessary for us to see that petitioner has not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor." (R 214) The Court reported that it could "find nothing in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material

²⁶Gunther affidavit (R 139-141).

presented by petitioner, to show that a three-physician panel was ever applicable prior to 1959, to engineers on the San Diego and Arizona Eastern Railroad." (R 215)

SUMMARY OF ARGUMENT

Despite the mandate of the Railway Labor Act—that "on the trial of such suit [an action to enforce an award and order of the National Railroad Adjustment Board] the findings and order of the . . . Board shall be prima facie evidence of the facts therein stated" (45 USC § 153, First (p))—the Court of Appeals has affirmed a District Court judgment, *entered upon the carrier's motion for summary judgment*, setting aside such an award.

The award which petitioner requested the District Court to enforce incorporated the Board's finding that when the carrier's right to determine the physical fitness of its employees to perform their assignments collides with the employee's "right to priority in service according to seniority and pursuant to the agreement so long as he is physically qualified" (R 6); the Board "has jurisdiction to determine whether the employee has wrongfully been deprived of service" (R 6) by resort to the findings of a "neutral board of three qualified physicians." (R 6)

The rationale of the decisions below is that, because the most recently printed "agreement" (a document setting forth a collective agreement *executed on November 30, 1938*), as interpreted by the District Court

and the Court of Appeals, contains no language limiting the "residual" or "reserved" right of the carrier to determine the physical fitness of its locomotive engineers, the Board's award, based on a contrary interpretation, is *ultra vires* and hence unenforceable.

This summary rejection of the Board's determination of the underlying rights and duties of the parties, and of petitioner's suit, contravenes the applicable law.

Summary judgment may not be granted if the record discloses a triable issue of fact. Rule 56, Rules of Civil Procedure. Rights and duties arising out of collective bargaining conducted pursuant to our national labor laws are not restricted to those unambiguously expressed in the most recently printed document purporting to be the collective agreement. *John Wiley & Sons v. Livingston*, 376 US 543, 550. Collective agreements are not the simple product of a consensual relationship. Their construction is not governed by common law principles. The rights and duties which they reflect are to be ascertained by reference to the common law of the industry. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, 578. These rules of federal law, fashioned "from the policy of our national labor laws" (*Textile Workers Union v. Lincoln Mills*, 353 US 448, 456), apply to this action for enforcement of a Board award. *International Ass'n of Mach. v. Central Airlines*, 372 US 682, 691; *Republic Steel Corp. v. Maddox*, _____ US _____, 13 L ed 580, 585, 85 S Ct 614, 617-618.

The Board's function—to hear and determine disputes “growing out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules or working conditions” (45 USC § 153, First (i))—must be deemed to include the power to determine what are the rights and duties which arise out of the collective bargaining and dispute-adjusting process structured by the Railway Labor Act. Railroad workers now may be enjoined from resorting to concerted economic action to remedy a grievance cognizable by the Board, or to enforce compliance with an award of the Board. *Brotherhood of R.R. Trainmen v. Chicago, R. & I. R. Co.*, 353 US 30; *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.*, 373 US 33. Thus, their only means of implementing rights arising under the Railway Labor Act, and the negotiations which it enjoins upon carriers and their employees, is resort to the Board and, if the carrier refuses to comply with the Board's award, to the federal district courts.

This lends to Board findings as to the nature of such rights substance at least the equivalent of those of arbitration tribunals established pursuant to the collective bargaining process structured by the Labor Management Relations Act, and precludes their rejection by the enforcing court on the basis of that court's contrary interpretation of the applicable agreement. *United Steelworkers v. Enterprise W. & C. Corp.*, 363 US 593, 597. Certainly it precludes their rejection on proceedings for summary judgment which necessarily deprives the employee of the “trial de novo” provided for by the Act.

ARGUMENT

I

FACTUAL SUMMARY.

On October 2, ¹⁹⁵⁶~~1958~~ the First Division of the National Railroad Adjustment Board, pursuant to petitioner's submission, issued an award, the findings portion of which included—

“Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

“It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

“If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

“Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has

not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by carrier and one by the employee and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians." (R 6-7.)

Pursuant to this finding it made its award whereby petitioner's claim for reinstatement to active service, with back pay, was to depend upon the findings of a neutral board of physicians to be selected by the parties (R 7).

The parties complied with the Board's order to make the award effective and the majority of the board of physicians found that petitioner had no physical defect which would prevent him from carrying on his usual occupation, but the carrier advised petitioner that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty." (R 9-10.)

Whereupon, petitioner re-submitted his claim to the Board and on October 8, 1958, the Board, finding the foregoing to be true, issued its award and order to the carrier to reinstate petitioner to active service with pay for time lost (R 11).

Petitioner incorporated the findings, award and order of October 2, 1956 and the interpretation, award

and order of October 8, 1958 into his petition to the District Court for an order enforcing same pursuant to Section 3, First (p) of the Railway Labor Act (45 USC § 153, First (p)). (R 3.) He alleged that by the terms of the applicable collective bargaining agreement he had seniority rights which entitled him to continue in the active service of the carrier as a locomotive engineer (R 2); that at the time of his removal from service on December 30, 1954 he was qualified physically to perform the duties which the carrier required of its locomotive engineers (R 2); and that said removal was, in fact, imposition upon him of compulsory retirement in violation of his rights under said agreement (R 2).

On the carrier's motion for summary judgment a printed booklet purporting to constitute the applicable collective bargaining agreement executed on November 30, 1938 was submitted to the District Court and alleged by the carrier to be the applicable collective bargaining agreement as of the date it removed petitioner from active service, December 30, 1954 (R 14, 40). Petitioner alleged, in opposition to the motion, that the terms of that agreement were ambiguous and that the terms of his employment with the carrier were not only to be found in said booklet but also by resort to custom and practice in the industry (R 54).

The District Court considered the 1956 award, as interpreted by that dated October 8, 1958, to constitute a single award "taking effect with the issuance of the second". (R 58.) Restricting its search for the underlying rights and duties of the parties to the

booklet referred to above, it found no provision limiting the carrier's "residual right" (R 71) to determine the physical fitness of its employees (R 71, 77, 96). It did not interpret the seniority provisions of the booklet, or those protecting locomotive engineers against discharge except for cause, to limit said "residual right" in any way (R 71). It did not consider that any ambiguity existed permitting resort to evidence extrinsic to the booklet to ascertain petitioner's rights or the carrier's duties (R 71). It deemed the Board's jurisdiction to extend only to the interpretation and application of existing agreements (R 63, 78-79). Hence it entered summary judgment setting aside the award and order of reinstatement with back pay and entered judgment for the carrier (R 97).

When petitioner presented to the District Court, on his Rule 60 (b) motion for relief from said judgment, conclusive proof that, in the railroad industry contractual rights and duties are evidenced by materials extrinsic to the most recently printed "agreement", the District Court "found nothing in the record to justify petitioner's failure to discover and present to the Court prior to the rendition of judgment the evidence he now proffers." (R 34.) And it ruled that, in any event, "(R)ecourse to statements in affidavits filed by the defendant is not required for us to see that petitioner has not produced and would not be able to produce at trial, any evidence which could lead to a determination in his favor." (R 214.)

The Court of Appeals affirmed the summary judgment because it found no dispute growing out of a

grievance or contract interpretation to be presented by petitioner's removal from active service on the ground of physical unfitness (R 230, 235). It affirmed the order denying petitioner's Rule 60 (b) motion because it was unwilling to excuse petitioner's "failure to search or inquire" for the proof presented in support thereof during the pendency of the second motion for summary judgment (R 234).

II

THE RIGHTS AND DUTIES OF RAILROAD EMPLOYERS AND EMPLOYEES ARISING OUT OF THE COLLECTIVE BARGAINING PROCESS ARE NOT RESTRICTED TO THOSE EXPRESSLY AND UNAMBIGUOUSLY STATED IN THE MOST RECENTLY PRINTED DOCUMENT PURPORTING TO BE THE AGREEMENT. THE DECISIONS BELOW ARE IN CONFLICT WITH THE GROWING BODY OF FEDERAL SUBSTANTIVE LAW APPLICABLE IN SUITS TO ENFORCE RIGHTS ARISING OUT OF THE RAILWAY LABOR ACT AND COLLECTIVE BARGAINING CONDUCTED PURSUANT THERETO.

It is respectfully submitted that recent decisions of this Court, commencing with *Textile Workers Union v. Lincoln Mills*, 353 US 448, have established rules of law which, applied to the facts of this case, require reversal of the adverse judgments below and remand of this cause to the District Court for the trial "de novo" provided by Section 3, First (p) of the Railway Labor Act (45 USC § 153, First (p)).

At issue is the effect in the civil suit referred to in said statute of the Board's findings as to the underlying rights and duties of railroad carriers and em-

ployees resulting from the collective bargaining and dispute-adjusting process structured by the Railway Labor Act.

The Act confers jurisdiction upon the Board to hear and determine petitions for resolution of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ." (45 USC § 153, First (i), emphasis added.) "(A)wards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award." (45 U.S.C. § 153, First (m).) "In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award before a day named." (45 USC § 153, First (o).)

Also, the Act confers jurisdiction upon federal district courts to entertain petitions for an order enforcing such awards.

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth the causes for which he claims relief, and the order of the division of the

Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board *shall be prima facie evidence of the facts therein stated*, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 USC § 153, First (p), emphasis added.)

It was not until this Court decided *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.*, 373 US 33, that it was clear that the Norris-LaGuardia Act did not prohibit the enjoining of strikes threatened to enforce such awards. The availability of such threat to the organizations of railroad employees prior to said decision may explain the remarkably low incidence of Section 3, First (p) enforcement suits.

In any event, there is a paucity of case authority on the subject. There remains indecision, for example, as to whether *Brotherhood of Locomotive Engineers*

v. Louisville & N. R. Co., supra, established that non-money awards, as well as money awards, are subject to review in the "de novo" action. (Compare *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.* (CA 5, 1964) 334 F. 2d 79 and *Russ v. Southern Railway Company* (CA 6, 1964) 334 F. 2d 224, 227.)

Judicial reception to Board awards has not been consistent. In *Washington Terminals Co. v. Boswell* (CA DC, 1941) 124 F. 2d 235, affirmed by an equally divided Court, 319 US 732, the method of review afforded by Section 3, First (p) of the Act was held to be exclusive. The language of the statute conferring prima facie evidentiary value to the Board's findings was explained as follows:

"The statute also relieves the employee of another burden. It provides that the enforcement suit 'shall proceed in all respects as other civil suits, except' that on the trial * * * the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' 45 U.S.C.A. §153, First (p). The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they so so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed

upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative not merely presumptive in value, having effect fairly comparable to that of expert testimony." (124 F. 2d 124, 141.)

Subsequently, in *Elgin J. & R. Co. v. Burley*, 327 US 661, this Court confirmed the probative value of the Board's findings with the following language:

"Moreover, when an award of the Adjustment Board involving an employee's individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. Its action in adjusting an individual employee's grievance at the instance of the collective bargaining agent is entitled to presumptive weight. For, in the first place, there can be no presumption either that the union submitting the dispute would undertake to usurp the aggrieved employee's right to participate in the proceedings by other representation of his own choice, or that

the Board knowingly would act in disregard or violation of that right. Its duty, and the union's, are to the contrary under the Act.

Furthermore, the Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." (327 US 661, 664-665.)

Despite the tone of judicial deference sounded in *Washington Terminals* and *Elgin*, civil suits to enforce Board orders did not fare well. Some were rejected on the ground that the award and order sought to be enforced was too vague, or of insufficient finality. *Railroad Yardmasters of N. A., Inc. v. Indiana H. B. R. Co.* (CA 7, 1948) 166 F. 2d 326; *System Federation etc. v. Louisiana & A. R. Co.* (CA 5, 1941) 119 F. 2d 509; *Smith v. Louisville & N. R. Co.* (SD Ala., 1953) 112 F. Supp. 388. This was the fate of petitioner's first enforcement suit which he filed to enforce the award of October 2, 1956. *Gunther v. San Diego & Arizona Eastern Ry. Co.* (SD Calif., 1958) 161 F. Supp. 295.

Other courts were more receptive. Thus, in *Kirby v. Pennsylvania R. Co.* (CA 3, 1951) 188 F. 2d 793, the district court's dismissal of an enforcement suit on the ground that it was too vague was reversed. The court of appeals said—

"So we have this situation. The Congress has provided for the submission of certain railway labor disputes to a body which over the years has established its own method of operation in a way which gives each side a chance to have its problems heard and decided by persons who are thoroughly familiar with the industry and the kind of questions presented. The law making body has thought well enough of the type of operation to provide for the enforcement of its results where necessary. But it has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board *prima facie* only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings. We think under these circumstances to insist upon the kind of definite requirement of findings of fact to which we are accustomed in the ordinary non-jury case would be doctrinaire and unrealistic. We think courts should take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them." (188 F. 2d 793, 796.)

And, in *Hodges v. Atlantic Coast R. Co.* (CA 5, 1962) 310 F. 2d 438 the district court's dismissal of a petition to enforce an award which, "in effect, ordered a medical compulsory arbitration" (310 F. 2d 438, 441) as being "too vague to be final and enforceable." (310 F. 2d 438, 440) was reversed. The court of appeals said—

"Thus we think that there was an award of sufficient definiteness to invoke the aid of the District Court in its enforcement. The Court was

therefore in error in having dismissed it outright. And to this extent we reject the cases urged by the Carrier and accepted as authoritative by the District Court. *Smith v. Louisville & Nashville R. R.*, D. C. Ala., 1953, 112 F. Supp. 388; *Gunther v. San Diego & Arizona Eastern Ry.*, S. D. Calif., 1958, 161 F. Supp. 295; 1961, 192 F. Supp. 882; 1961, 198 F. Supp. 402. The Court on remand should therefore enter appropriate orders to effectuate the medical examinations for use by the Adjustment Board." (310 F. 2d 438, 443.)

(See also *Hanson v. Chesapeake & O. R. Co.* (DC SD W. Va., 1961) 198 F. Supp. 325.)

(The events subsequent to the court of appeals' reversal in the *Hodges* case are reported in *Hodges v. Atlantic Coast R. Co.* (DC ND Ga., 1964) 238 F. Supp. 425.)

Another line of authority is that which refuses enforcement to awards which are found by the court to be predicated upon a non-existent duty. The Board's jurisdiction, it is said, is confined to the interpretation and application of existing agreements. Ergo, if the court deems the award sought to be enforced to have no predicate in the collective bargaining agreement, the award is set aside as *ultra vires*, because the court's determination as to what is the applicable agreement, or its interpretation of same, differs from that of the Board.

This is essentially what has happened in the case at bench. The Court of Appeals cited no authority for its rejection of the Board's finding that petitioner's

seniority rights, in conflict with the carrier's right to determine the physical fitness of its employees, limit the latter right to the extent that the petitioner is entitled to independent appraisal of his physical fitness. It is clear, however, that its conclusion that the Board had exceeded its jurisdiction is based upon its reading of the 1938 booklet and determining therefrom, contrary to the Board's finding, that "there was no contrary provision (to the carrier's 'reserved right' (R 230) to determine the physical fitness of its employees) in the contract between the Railroad and the Brotherhood of Locomotive Engineers as of the date of appellant's removal." (R 231.)

The District Court documented its summary rejection of petitioner's suit on the ground that the Board had exceeded its jurisdiction by citing *Southern Pacific Co. v. Joint Council Dining Car Employees* (CA 9, 1947) 165 F. 2d 26 and *Thomas v. New York C. & St. L. R. Co.* (CA 6, 1950) 185 F. 2d 614.

The *ultra vires* doctrine has its inception in a dictum in *Hunter v. Atchison, T. & S. F. R. Co.* (CA 7, 1948) 171 F. 2d 594, a suit by a group of train porters to enjoin the implementation of an award issued in a proceeding to which they were not a party. In affirming the grant of injunctive relief the court of appeals said—

" * * * In reality what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier.

" * * *

"While we are of the view that the Award is void because the Board exceeded its authority, we place our decision primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied." (171 F. 2d 594, 599.)

The dictum was repeated in *Thomas*, supra, and in *Shipley v. Pittsburgh & L. R. Co.* (WD Pa., 1949) 83 F. Supp. 722. However, our research indicates that only in the decisions discussed below and the recently decided *Hanson v. Chesapeake & O. R. Co.* (SD W. Va., 1964) 236 F. Supp. 56 has it been the ground for summary dismissal of a subsection First (p) enforcement suit.

Limitation of the Board's jurisdiction to the interpretation and application of existing agreements appears highly questionable in view of the language of the statute which confers jurisdiction to hear petitions for the resolution of disputes "growing out of grievances *or* out of the interpretation or application of agreements" (45 USC § 153, First (i)) This dual jurisdiction was noted in *Thomas v. New York C. & St. L. R. Co.*, supra, 185 F. 2d 614. The court there considered that the Board had jurisdiction to hear the *grievance* of a private car steward who was not a member of any craft or class of represented employees and who was, therefore, without the protection of a collective agreement. His suit to enforce the Board's award of reinstatement was not rejected because the award was jurisdictionally defective; the

district court's judgment for the carrier was affirmed "for the simple reason that appellant did not prove his case."

"Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged only if some right arising out of contract or the law was violated by his discharge. No evidence was introduced from which the court could draw such a conclusion." (185 F. 2d 614, 616)

(See also *Russ v. Southern Railway Co.*, supra, 334 F. 2d 224.)

Petitioner here suggests that extension of the Board's power to hear and determine *grievances* as well as disputes growing out of the interpretation and application of agreements is clear indication that Congress did not intend to limit the Board's power to the interpretation and application of the latest edition of the "agreement". There is recognition here that in the railroad industry correlative rights and duties between carriers and their employees are created by the conference system employed in the settlement of claims and provided for by Section 2, Sixth of the Act (45 USC § 152, Sixth) as well as by the consensual agreements which emerge from the negotiations for "changes in agreements affecting rates of pay, rules or working conditions" pursuant to Section 6 of the Act (45 USC § 156).

The decisions below limit the area of the Board's search for rights and duties upon which to predicate its award to the confines of a fifteen year old booklet.

Consideration of the "custom and practice" which petitioner alleged to be a source of his right to remain in service was denied.

(But custom and practice does provide evidence of contractual rights and obligations. In *Order of Railway Conductors v. Pitney*, 326 US 561, this Court said—

"The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. [citing authorities] For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." (326 US 561, 566-567)

This observation that interpretation of collective agreements in the railroad industry involves more than "the mere construction of a document" conflicts sharply with that of the District Court in this case—

"Accordingly, we hold that the right of the carrier to terminate the employment of its workers, except as prohibited by statute, remains with the carrier to the extent not surrendered by the

terms of a collective bargaining agreement, and that the extent of such surrender is to be determined by the plain words of the agreement under the rules governing the interpretation of contracts." (R 76, emphasis added))

Also, no allowance was made to the Board to consider the product of the continuing negotiations since November 30, 1938, the date the agreement set out in the booklet was executed, and the date of petitioner's removal from service, December 30, 1954, as a source of his right to independent appraisal of his physical fitness. (See affidavit of J. P. Colyar and attached exhibits, R 105 *et seq.*) No credit was granted to the Board's interpretation of the applicable agreement based upon the conflict between the right of the carrier to determine the physical fitness of its employees for service and that of the employee to continued service in accordance with his seniority.

This not only contravened this Court's expressions as to the expertise of the Board and Congress's grant of presumptive validity to its findings; it is irreconcilable with "the Federal law, fashioned 'from the policy of our national labor laws' " which controls. *Wiley & Sons v. Livingston*, 376 US 543, 548 quoting from *Textile Workers Union v. Lincoln Mills*, 353 US 448, 456. For, under that law—

"* * * . . . a collective bargaining agreement is not an ordinary contract. ' . . . (I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate . . . The collective bargaining agreement covers the whole

employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.” *Wiley & Sons v. Livingston*, supra, 376 US 543, 550 quoting from *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, 578-579.

In *Textile Workers Union v. Lincoln Mills*, supra, this Court ruled that Section 301 (a) of the Labor Management Relations Act of 1947, by conferring jurisdiction upon federal district courts to hear and determine suits for violation of collective bargaining agreements resulting from the collective bargaining process structured by that Act, “expressed a federal policy that federal courts should enforce these agreements . . . and that industrial peace can be best obtained in that way.” (353 US 448, 455.) Further it was held that “the substantive law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws.” (353 US 448, 456.)

In *Machinist's Asso. v. Central Airlines*, 372 US 682, this Court held that a suit to enforce an award of an airline system board of adjustment established by agreement pursuant to Section 204 of the Railway Labor Act (45 USC § 184) was a suit “arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 USC 1331 if the jurisdictional amount is satisfied and in any case under § 1337.” (372 US 682, 696.) More important for the case at bench, the Court made it clear that in such

enforcement action the law which the courts must fashion from the policy of our national laws applies.

“Whether Central must comply with the award or whether, instead, it is impeachable are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose.” (372 US 682, 695.)

In support of this view the Court quoted from *Railway Employees Dept. A.F. of L. v. Hanson*, 351 US 225, 232—“(A) union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it.” 372 US 682, 692.)

Most recently, in *Republic Steel Corp. v. Maddox*, US, 13 L ed 580, 85 S Ct 614, this Court, by refusing to extend the rationale of *Moore v. Illinois Central R. Co.*, 312 US 630, and *Transcontinental & Western Air v. Koppal*, 345 US 633—“that federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act”—(13 L ed 580, 585, 85 S Ct 614, 617)—suggests strongly that the “precepts of Lincoln Mills” (13 L ed 580, 585, 85 S Ct 614, 618) are applicable to civil suits brought pursuant to the Railway Labor Act to enforce the terms of a collective bargaining agreement as incorporated into an award and order of the Adjustment Board.

What, then, is the law, fashioned from the policy of our national labor laws, as to the effect in the enforcement action of the Board’s findings as to the underlying rights and duties of railroad carriers and

employees resulting from the collective bargaining and dispute-adjusting process structured by the Railway Labor Act?

Petitioner respectfully submits that the answer to this question is found in the Congressional mandate—"on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"—and the decisions of this Court commonly referred to as the Steelworkers Trilogy.

The Court of Appeals did not consider that the principles enunciated in *United Steelworkers of America v. American Mfg. Co.*, 363 US 564, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US 574, and *United Steelworkers v. Enterprise Corp.*, 363 US 593 applied here because "Here the parties have not agreed to arbitrate." (R 232.)

This ignores the realities of collective bargaining in the railroad industry.

Collective agreements are made pursuant to Congress's mandate—"It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements, or otherwise, in order to avoid any interruption to commerce or the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (45 USC § 152, First.) Such disputes "shall be consid-

ered and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (45 USC § 152, Second.) This duty to confer "in respect of such dispute" requires either party, on ten days notice from the other, to specify a place for the conference and a time therefor not to exceed twenty days from the receipt of such notice (45 USC § 152, Sixth). And, if the dispute is not resolved by the parties by being "handled in the usual manner up to and including the chief operating officer designated to handle disputes . . . (it) . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . ." (45 USC § 153, First (i); emphasis added.)

Thus, by entering into an agreement such as that contemplated by the Act, the parties brought themselves within the aegis of a comprehensive statutory dispute-adjustment scheme which includes, as an integral part, the "therapy of arbitration." *Carey v. Westinghouse Electric Corp.*, 375 US 261, 272.

The 1938 booklet contains provisions which, although formulated in the incomplete and unlawyerlike manner which characterizes the entire document, indicate that the dispute-adjusting method described in the Act was to be employed. (Examples are Articles 65 and 66 set forth at page 81 thereof.) (R 19.)

Thus, not only does the applicable agreement comprehend Board proceedings as the final step in the

“administrative remedy”, but, in addition, the record herein demonstrates that when petitioner, through his organization, the BLF&E, exercised his right to refer the dispute to the Board, SD&AE participated fully in the proceedings, and, for that matter, acquiesced in the Board’s first order by participating in the selection of a three-physician board.

Recent decisions of this Court, in effect, limit the railroad worker with a grievance to his petition to the Board, and the railroad worker who has obtained a favorable Board award to the civil suit provided by subsection First (p) of Section 3 of the Act. Strikes to remedy such a grievance or to enforce such an award may be enjoined. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 US 30; *Brotherhood of Locomotive Engineers*, *supra*, 373 US 33.

Thus, to the railroad employee, the work of the Board, and the recognition accorded to it by the federal district courts, has acquired the same importance as has the work of arbitration tribunals, and the judicial reception accorded their work, to the industrial employee working under a collective agreement which includes a no-strike clause. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra*, 363 US 574; *United Steelworkers v. American Mfg. Co.*, *supra*, 363 US 564.

In the case of the industrial worker, this Court, “developing a meaningful body of law to govern the interpretation and enforcement of collective bargain-

ing agreements" (*United Steelworkers v. American Mfg. Co.*, supra) has emphasized that because "It merely disagreed with the arbitrator's construction" of the contract does not justify the enforcing court's refusal to enforce an arbitration award. *United Steelworkers v. Enterprise Corp.*, 363 US 593, 598.

It is respectfully submitted that the decisions below are erroneous and that this cause should be remanded to the District Court for trial. It is also respectfully submitted that in the trial de novo on remand applicable federal substantive law precludes the trial court from determining the underlying rights and duties of the parties to be otherwise than as established by the findings of the Board; that its sole function will be to determine, on the basis of the evidence adduced, whether, as of December 30, 1954, petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers.

III

THE ORDER DENYING PETITIONER'S RULE 60 (b) MOTION WAS AN ABUSE OF EQUITABLE DISCRETION; IT WAS AN UNJUSTIFIABLE REFUSAL TO RECOGNIZE THE OBVIOUS, TO WIT, THAT THE UNDERLYING RIGHTS AND DUTIES OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT IN THE RAILROAD INDUSTRY ARE TO BE FOUND IN THE CONTINUING COLLECTIVE BARGAINING AND DISPUTE-ADJUSTING PROCESS STRUCTURED BY THE ACT AS WELL AS THE PRINTED AGREEMENT AND, ON THE BASIS THEREOF, TO SET ASIDE THE PRIOR JUDGMENT WHICH RESTED SQUARELY UPON THE CONTRARY VIEW THAT THE SOLE SOURCE OF SUCH RIGHTS AND DUTIES WAS THE FIFTEEN YEAR OLD AGREEMENT.

The events which followed entry of summary judgment for the carrier are set forth in the foregoing statement of the case. Petitioner's counsel, at a conference with Mr. J. P. Colyar, General Chairman for the BLE in San Francisco, was advised that, as a result of negotiations with SP and SD&AE officials in 1944 and 1947, as of November 13, 1947 both the SP-BLE agreement and the SD&AE-BLE agreement included provision for independent medical appraisal to resolve disputes as to the physical fitness of locomotive engineers to continue in active service (R 143).

Mr. Colyar's views (R 109), and the confirming evidence to support same (Exhibits A through O, Colyar affidavit, R 111-138) were presented to the District Court together with affidavits of petitioner (R 139-141) and his attorney (R 142-153) in explanation of their failure to discover same prior to summary judgment.

Rule 60 (b), Federal Rules of Civil Procedure provides, in part, as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

Petitioner's motion, made approximately eight months after entry of the summary judgment and approximately three months after discovery by appellant of the evidence which he brought to the court's attention by means of said motion, was made upon grounds (1), (2) and (6) of the Rule (R 103-104).

The rules applicable to such motions, and review of denial of same, are set forth in the following quote from *Petition of Devlas* (SD NY, 1962) 31 F.R.D. 130.

"The tenor of the cases decided under Rule 60 (b) makes it clear that this motion is equitable in nature and appeals to the conscience of the court. *Serio v. Badger Mutual Insurance Co.*, 266 F. 2d 418, 421 (5th Cir. 1959), cert. denied 361 U.S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73 (1959): 'The rule is to be liberally construed in order that judgments may reflect the true merits of a case.' *Consolidated Gas & Equipment Co. of America v. Carver*, supra, 257 F. 2d at p. 104: '(T)he rule is to be liberally construed as a grant of power to a court to vacate a judgment when such action is appropriate to accomplish justice.' *Huntington Cab. Co. v. American Fidelity & Casualty Co.*, 4